FILE COPY

IN THE

Supreme Court of the United States

January Term, 1938.

No. [redacted] 16

MARK O. DAVIS, *Petitioner*,

v.

MAUDE E. DAVIS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

JOSEPH T. SHERIER,
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Subject Index.

CASES.

STATUTES.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

Mark O. Davis respectfully petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia, to remove therefrom, for review here, the record in the case therein No. 6745, wherein petitioner is appellant and Maude E. Davis is appellee, and in which case that Court announced its opinion under date of March 7, 1938 (R. p. 73), reversing the decision of the District Court of the United States for the District of Columbia.

Reasons Relied Upon for Allowance of the Writ.

1. The decision of the court below, refusing recognition to the decree of the Virginia court, violates Article IV, Section 1 of the Constitution.

2. The holding of the court below, denying full faith and credit to the Virginia decree, is not only in conflict with the decisions of this Court, but also with its own earlier rulings.

3. The ruling of the court below that the appearance and participation of the respondent in the hearing on the question of jurisdiction in the Virginia court did not give that court full jurisdiction, and did not constitute a waiver of objection to jurisdiction, is in direct conflict with the decisions of this Court.

4. The ruling of the court below that the petitioner, subsequent to the judicial separation granted him, could not acquire a new domicile which would support an action for divorce, is in conflict with the decisions of this Court.

5. The ruling of the court below that the petitioner could not acquire a new domicile which would support an action for divorce, is in conflict with its own prior decisions.

6. The holding below that, in the absence of personal service in Virginia or the voluntary appearance of the wife and participation in the hearing on the merits, the Virginia decree was not entitled to full faith and credit, because that state was not the last matrimonial domicile of the parties, conflicts with every decision of this Court and the court below on the subject.

7. The decision of the court below was by three judges only, and not by the full court of five required by statute, although hearing by the full court was requested.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6745, *Mark O. Davis, Appellant*, v. *Maude E. Davis, Appellee*, and that the judgment of the court below be reversed by this Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just.

JOSEPH T. SHERIER,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion below, announced March 7, 1938, is found on page 73 of the record.

The oral opinion of the District Court of the United States for the District of Columbia will be found at pages 57 and 58 of the record.

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Sec. 240 of the Judicial Code as amended by Act of February 13, 1925, Title 28 U. S. C. A., Sec. 347a.

Statement of the Case.

On October 29, 1925, the Supreme Court of the District of Columbia (now District Court of the United States for the District of Columbia), entered its decree, granting the petitioner, hereafter designated as the husband, a divorce *a mensa et thoro* from the respondent, hereafter spoken of as the wife, and awarded the custody of the infant daughter of the parties to the wife. It required the husband to pay monthly the sum of $300.00 for the maintenance of the wife and daughter, and tuition charges for the daughter.

On February 24, 1928, the husband, then a resident of Arlington County, Virginia, filed his bill in the circuit court thereof, praying an absolute divorce from the wife, on the ground of her desertion. She was served in the District of Columbia with process of the Virginia court; appeared specially and, by plea, challenged the jurisdiction of the court on the ground that the husband had not been an actual bona

fide resident of the State for one year next preceding the commencement of his suit, as required by the Virginia statute. R. pp. 26, 27, 32.

In conformity to its practice, the Virginia court referred the issue presented to a commissioner in chancery to take testimony and report. The wife and three witnesses testified in her behalf. The husband offered proof as to the bona fides of his residence. The commissioner found and reported that the husband was an actual bona fide resident of Arlington County, Virginia, for more than one year before the filing of his suit. Exceptions to the report were overruled and the husband adjudged to be an actual bona fide resident of the county and state. No appeal was taken from this order. R. pp. 34, 35, 36, 37.

Thereafter testimony was taken on the merits of the cause, seasonable notice of the time and place of each hearing having been given the wife. R. p. 23. Subsequent to the order confirming the commissioner's report, she did not appear in the cause.

On June 26, 1929, a final decree granted the husband an absolute divorce, without alimony to the wife. R. p. 22.

On December 30, 1929, the husband filed in the Supreme Court of the District of Columbia his petition, setting up the proceedings in the Virginia court and praying that the decree of the District Supreme Court entered October 29, 1925, insofar as it required the payment of alimony to the wife, be vacated. Neither answer nor proof challenged the allegations of the petition. After hearing as on demurrer, an order denied the prayers of the petition.

An appeal to the court below resulted in affirmance of the judgment. 61 App. D. C. 48. The opinion shows it did not then decide the Virginia decree was not entitled to recognition in this District, but, on the contrary, based its judgment on the ground that the local court, having first acquired jurisdiction of the cause, its authority continued and could not be annulled or superseded by the courts of Virginia. R. pp. 61, 75.

On October 27, 1933, the husband remarried in Virginia. R. p. 53.

The petition here involved was filed on April 16, 1935. It averred the entry of the decree of the Supreme Court of the District, granting the limited divorce, and the Virginia proceedings. An answer alleged want of jurisdiction in the Virginia court, because the husband was not a bona fide resident of the state. It did not plead the judgment of the court below on the former appeal as *res judicata* of the questions presented. The husband moved to strike the answer on the ground that the defense relied upon was not available to the wife because of the prior judgment of the Virginia court on the issue of jurisdiction. The motion was denied on the ground that, although the wife had submitted to the Virginia court the question of the domicile of the husband, and was bound by its decision in that respect, she had not submitted to that court the merits of the cause, and its decree was not *res judicata* on the question of the matrimonial domicile, nor upon the merits of the cause. Rehearing of the motion was denied. R. p. 56.

Thereafter the cause came on for hearing in the trial court on petition and answer. Counsel for the wife orally requested the court to continue the hearing, stating that he desired to offer the testimony of the wife and three witnesses (none of whom were in attendance upon the court) to the effect that the husband was not an actual bona fide resident of Virginia at the time of filing his suit there. The husband opposed the application because it was not seasonably made, and on the further ground that he would admit the witnesses, if present, would testify as indicated by the wife's counsel. He claimed, however, such testimony would be inadmissible in view of the prior adjudication of the Virginia court on that issue. The admission was not required by the court. The motion was denied.

The husband thereupon offered in evidence the prior proceedings in the District court, and those in the Virginia court. No testimony supported the answer.

The petition was denied on the ground that the issues presented were controlled by the former decision of the court of appeals.

From this ruling the husband appealed to the court below, which affirmed the judgment. Although stating in its opinion that its former decision established the law of the case, (notwithstanding it had not therein decided the question here presented) the court below considered the question of the effect to be given the Virginia decree, and held that to entitle it to full faith and credit in the courts of the District of Columbia it must appear that Virginia was the last matrimonial domicile of the parties, or, if not, that the wife was subjected to the jurisdiction of the Virginia court either by personal service within the state or by voluntary appearance and participation in the trial on the merits. It accordingly denied effect to the Virginia decree.

The challenged decision was by a court of three judges only, whereas the statute required a full bench of five judges.

Specification of Errors.

1. The court below erred in holding that the Virginia court did not have jurisdiction of the subject matter and the parties, and in denying to its judgment full faith and credit.

2. The court below erred in hearing and determining the cause in the absence of the required full court of five judges.

Questions Presented.

I. Was the judgment of the Virginia court, concededly valid in that state, entitled to full faith and credit in the courts of the District of Columbia?

II. Was the judgment of the court below, by less than the *required full* court of five judges, valid?

ARGUMENT.

1. The decision of the court below, refusing recognition to the decree of the Virginia court violates Article IV, Section 1, of the Constitution.

Section 1, Article IV, of the Constitution requires that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

Section 905, Rev. Stats. (U. S. Comp. Stats. 1901, p. 677) provides:

> "that the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

It is not disputed that the Virginia court had jurisdiction over the matter of divorces, and it is not denied that service of process upon the wife was obtained in strict accordance with the provisions of the state statute. The question of the residence of the husband having been unsuccessfully challenged by the wife in the state court, its decision in that respect is final.

Section 5103 of the Code of General Laws of Virginia conferred jurisdiction upon the circuit court of Arlington County to grant divorces where the complaining party had been a resident of the state for one year. The manner of obtaining service upon non-resident defendants is provided by Section 5108. The wife's unsuccessful attack on the court's jurisdiction over the husband on the ground of his non-residence established its complete authority to proceed to a final decree, valid in that state. Being valid there, it is entitled in the courts of the District of Columbia to the same faith and credit accorded it by law or usage in Virginia.

The refusal of the court below to give that decree the full effect required is violative of the Constitution and statutes

of the United States. *Cheeley* v. *Clayton*, 110 U. S. 701, 705; *Atherton* v. *Atherton*, 181 U. S. 155; *Thompson* v. *Thompson*, 226 U. S. 551.

2. The holding of the court below, denying full faith and credit to the Virginia decree, is not only in conflict with the decisions of this Court, but also with its own earlier rulings.

In *Thompson* v. *Thompson*, *supra*, affirming 35 App. D. C. 14, this Court held that a decree of the Virginia court, awarding the husband an absolute divorce, without alimony to the wife, was entitled to recognition in the courts of the District of Columbia and, when presented to the latter, had the effect of annulling a decree for maintenance in favor of the wife. There it was said:

> "This being so, it is clear that the resulting decree is entitled, under the Act of Congress, to the same faith and credit that it would have by law or usage in the courts of Virginia. As the laws of that state provide for a divorce from bed and board for the cause of desertion, and confer jurisdiction of suits for divorce upon the circuit courts; * * * and since the courts of Virginia hold upon general principles that alimony has its origin in the legal obligation of the husband to maintain his wife, and that although this is her right, she may by her conduct forfeit it, and where she is the offender, she cannot have alimony on a divorce decreed in favor of the husband * * * it is plain that such a decree forecloses any right of the wife to have *alimony* or equivalent maintenance from her husband under the law of Virginia.
>
> "From this it results that the Court of Appeals of the District of Columbia correctly held that the Virginia decree barred the wife's action for maintenance in the courts of this District."

This ruling of the Court followed its prior decisions in *Cheeley* v. *Clayton*, and *Atherton* v. *Atherton*, *supra*.

As shown above, the present holding of the court below conflicts with its earlier reasoning and conclusion in *Thomp-*

son v. *Thompson*, *supra*. It is also opposed to *Bloedorn* v. *Bloedorn*, 64 App. D. C. 199, 201, which sustained a Virginia decree of absolute divorce in favor of the husband as a bar to the right of the wife to maintenance under a prior decree of the District court. The court below there stated:

> "While the decree appealed from in form merely dismisses a motion and discharges a rule in respect of a small amount of alimony then accrued, in legal effect it operates to va ate the provision made for the wife by recognizing that she is no longer wife, because of the Virginia decree, and the Virginia law makes no provision for *alimony* to a wife against whom a divorce has been granted. *Thompson* v. *Thompson*, 226 U. S. 551."

3. The ruling of the court below that the appearance and participation of the wife in the hearing in the Virginia court on the question of jurisdiction did not give that court full jurisdiction, and did not constitute a waiver of objection to jurisdiction, is in direct conflict with the decisions of this Court.

The court below apparently thought that the special appearance and unsuccessful contest of the wife of the jurisdiction of the Virginia court over the husband did not confer upon that court authority to proceed to a valid, final judgment, and did not constitute a waiver of objection to jurisdiction or estop her to again litigate that question in another forum.

This ruling, it is believed, is in direct conflict with the holding of this Court in *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, 525, where it was decided that a defendant, appearing specially to contest the jurisdiction of the court, and having had his day in court on that issue, could not again litigate the question in a suit brought to enforce the judgment in a nother court. This Court there said:

> "The special appearance gives point to the fact that the respondent entered the Missouri court for the very

purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. * * * It had also the right to appeal from the decision of the Missouri district court, as is shown by *Harkness* v. *Hyde*, 98 U. S. 476, 25 L. ed. 237, supra, and the other authorities cited. It elected to follow neither of those courses, but after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

See also *American Surety Co.* v. *Baldwin*, 287 U. S. 166.

4. The ruling of the court below that the petitioner, subsequent to the judicial separation granted him, could not acquire a new domicile which would support an action for divorce, is in conflict with the decisions of this Court.

In *Barber* v. *Barber*, 21 How. 582, 594, this Court quotes with approval the statement from Bishop on Marriage & Divorce, as follows:

> "If he commits an offense which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim to the remedy. In other words, *she must establish a domicile*

*of her own, separate from her husband. * * * So when parties are already living under a judicial separation, the domicile of the wife does not follow that of the husband."*

Likewise, in *Cheever* v. *Wilson*, 9 Wall. 108, 124, this Court stated:

> "The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. * * * The proceeding for a divorce may be instituted where the wife has her domicile, *the place of the marriage*, of the offense, and *the domicile of the husband are of no consequence.*"

The same conclusion is reached in *Haddock* v. *Haddock*, 201 U. S. 562, 583, where this Court, in discussing the right of an innocent spouse to establish a separate domicile, said:

> "Of course, the rigor of the English rule as to the domicile of the husband being the domicile of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicile."

And, finally, in *Williamson* v. *Osenton*, 232 U. S. 619, 625, 626, this Court again upheld the right of the innocent spouse to acquire a new domicile, saying:

> "However it may be in England, that in this country a wife in the plaintiff's circumstances *may get a different domicile from that of her husband for purposes of divorce is not disputed and is not open to dispute. * * * This she may do without necessity and simply from choice,* as the cases show, *and the change that is good as against her husband ought to be good as against all. In the later decisions the right to change and the effect of the change are laid down in absolute terms.*"

This rule, of course, operates in favor of a husband in like circumstances. *Hunt* v. *Hunt*, 72 N. Y. 217, 242.

5. The ruling of the court below that the petitioner could not acquire a new domicile which would support an action for divorce, is in conflict with its own prior decisions.

In *Rollins* v. *Rollins*, 60 App. D. C. 305, 307, and in *Marcum* v. *Marcum*, 61 App. D. C. 332, 334, the court below, following the decision of this Court in *Williamson* v. *Osenton*, *supra*, said:

> "Undoubtedly the wife may establish a different domicile from that of her husband for purposes of divorce. *Williamson* v. *Osenton*, 232 U. S. 619, 625, 34 S. Ct. 442, 58 L. Ed. 758. And this right is absolute whenever it is necessary or proper that she should do so. It springs from necessity, and endures as long as the necessity. In such cases, the legal fiction that the domicile of the husband is the domicile of the wife does not apply, and, when conditions require her to leave the home, or when she is driven from it and goes into another state for the purpose of there permanently residing, *she acquires a domicile in the latter which may entitle her to sue for divorce.*"

6. The holding below that, in the absence of personal service in Virginia or the voluntary appearance of the wife and participation in the hearing on the merits, the Virginia decree was not entitled to full faith and credit, because that state was not the last matrimonial domicile of the parties, conflicts with every decision of this Court and the court below on the subject.

Where one spouse has justifiably left the other, or the parties are living apart by virtue of a judicial separation, *there is no matrimonial domicile*, and the innocent party may acquire another, with jurisdiction in the courts of the latter to decree a divorce of binding validity everywhere.

Barber v. *Barber*, *Cheever* v. *Wilson*, *Cheeley* v. *Clayton*, *Haddock* v. *Haddock*, *Williamson* v. *Osenton*, *Rollins* v. *Rollins*, *Marcum* v. *Marcum*, *supra*.

7. The decision of the court below was by three judges only, and not by the full court of five required by the statute, although hearing by the full court was requested.

The Act of February 9, 1893 (27 Stats. 434), establishing the court of appeals of the District of Columbia, provided it should consist of one chief justice and two associate justices. The second paragraph of Section 6 of this Act reads:

> "If any member of the court shall be absent on account of illness or other cause during the session thereof, or shall be disqualified from hearing and determining any particular cause by having been of counsel therein, or by having as a justice of the Supreme Court of the District of Columbia previously passed upon the merits thereof, or if for any reason whatever it shall be impracticable to obtain *a full court of three justices*, the member or members of the court who shall be present shall designate the justice or justices of the Supreme Court of the District of Columbia to temporarily fill the vacancy or vacancies so created, and the justice or justices so designated shall sit in said Court of Appeals and perform the duties of a member thereof while such vacancy or vacancies shall exist, etc. • • •
>
> That if the parties to any cause shall so stipulate in writing, by their attorneys and solicitors, such cause may be heard and determined by two justices of the court without calling in any of the justices of the supreme court of the District of Columbia."

The District of Columbia Code, Section 221, adopted in 1901, recites:

> "The Court of Appeals of said District shall continue as at present organized and shall consist of one chief justice and two associate justices.

By Act of June 19, 1930, (46 Stats. 785) the number of justices was increased to five, but no other change was made in the organic statute.

Until this amendatory statute adding the two additional justices was passed, the court of appeals comprised "a full

court of three justices," and there was *no provision for a quorum*. By the Act of June 19th, *no provision was made for a quorum* and this Act may be construed as simply increasing the number of justices to five and of requiring, by implication, *a full court of five justices*.

It is significant that Congress in statutes relating to the Supreme Court of the United States, the Court of Claims, the Court of Customs Appeals and the old Commerce Court has been careful to specify the number of justices to constitute a quorum for the transaction of business.

In the case of the Supreme Court of the United States, the Act of April 10, 1869, (R. S. U. S., Section 673) provides:

> "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."

Section 685 (Act of April 29, 1802) describes what may be done when a quorum does not attend and Section 686 authorizes the Justices attending at any term when less than a quorum is present to make all necessary orders of a procedural nature.

Section 138, Ann. Fed. Code (U. S. C., Section 243) relating to the Court of Claims (consisting of a chief Justice and four judges) reads:

> "The Court of Claims shall hold one annual session at the City of Washington beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the Court. Any three of the judges of said court shall constitute a quorum and may hold a court for the transaction of business. *The concurrence of three judges shall be necessary to the decision of any case.*"

Section 188, Ann. Fed. Code (U. S. C. 301) establishing the Court of Customs Appeals (consisting of a presiding judge and four associate judges), provides:

"Any three members of said court shall constitute a quorum, and *the concurrence of three members shall be necessary to any decision thereof, etc.*"

Section 200, Ann. Fed. Code, relating to the Commerce Court created by the Act of June 18, 1910, and abolished by the Act of October 22, 1913, created a Court of five judges and provided:

"Four of such judges shall constitute a quorum, and at least a majority of the court shall concur in all decisions, etc."

The Act of February 13, 1925, (43 Stats. 938); Section 266, Ann. Fed. Code (U. S. C., Section 380) authorizing certain of the circuit and district judges to constitute a three judge court for the determination of and the issuance of injunctions in certain specific controversies requires:

"A majority of said three judges shall concur in granting such application."

No stipulation in writing was filed by the parties agreeing that the cause might be heard by less than a full court. In the motion for rehearing which was granted (R. p. 72) request was made for a rehearing *by the full court.* (R. p. 72.) In the light of these statutory precedents, it is submitted that the United States Court of Appeals, as now constituted, is without authority to hear and determine appeals by a court of three justices only.

In *Stratton* v. *St. Louis, Southwestern R. Co.*, 282 U. S. 10, 18, a single district judge, *without objection of the parties,* dismissed a bill in a case within the provision of the Act of Feb. 13, 1925, requiring a hearing by a three judge court.

The circuit court of appeals reversed the district court, and this Court, reversing the court of appeals, said:

"As the proceeding in this suit fell within the provision of the statute and the District Judge had no

jurisdiction to hear the motion to dismiss the bill on the merits, the consent of the parties could not give validity to the decree or confer jurisdiction upon the Circuit Court of Appeals to entertain an appeal therefrom."

The statute here, as there, required a full court and provided the means for obtaining the same.

Notwithstanding the holding of the court below that its earlier decision constitutes the law of the case, such ruling does not preclude this Court from re-examining the question involved. This is particularly true where the opinion under review shows definitely the court considered and determined the point. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 419; *Washington Ex Rel. Grays Co.* v. *Superior Court*, 243 U. S. 251, 257; *Davis* v. *O'Hara*, 266 U. S. 314, 321.

The judgment of the court below may be reviewed on certiorari, because, when entered, it will be final as to the question here presented. *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489, 492. See also Title 28, Sec. 347a U. S. C. A.

It is of great public importance, in view of the confusion which exists as the result of the decision below, and the possibility of its disastrous effects upon innocent persons, that this Court should review and reverse the judgment.

Respectfully submitted,

JOSEPH T. SHERIER,
Attorney for Petitioner.